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No. 87-

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1987

STATE OF MISSOURI,
Petitioner,

vs.

BRIAN CARPENTER,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSOURI

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35 pp

QUESTION PRESENTED

I.

Whether a peace disturbance statute making it unlawful to threaten to commit a crime against another person is unconstitutionally overbroad where express and implied limitations on its application are apparent, and any conceivable impermissible applications are dwarfed by the statute's legitimate reach.

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No. 87-

In the Supreme Court of the United States

OCTOBER TERM, 1987

STATE OF MISSOURI,
Petitioner,

vs.

BRIAN CARPENTER,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSOURI

OPINIONS BELOW

The Opinion of the Supreme Court of Missouri (App. A2) is reported at 736 S.W.2d 405 (Mo.banc 1987). The order denying Petitioner's motion for rehearing is unreported and appears in the appendix of this petition (App. A1). The Order of the Circuit Court of Jefferson County, Missouri, is unreported and also appears in the Appendix (App. A10).

JURISDICTION

The Supreme Court of Missouri's opinion was filed on September 15, 1987. Petitioner's timely petition for rehearing was denied on October 13, 1987 (App. A1). Pursuant to 28 U.S.C. §2101(d) and Supreme Court Rule 20(1), the present petition for a writ of certiorari was required to be filed within sixty (60) days of the denial of rehearing. Jurisdiction of this Court is invoked under 28 U.S.C. §1257(3).

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

1. Section 1 of the Fourteenth Amendment to the United States Constitution:

> All persons born or naturalized in the United States and subject to the jurisdiction thereof are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any state deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

2. Missouri Revised Statute §574.010.1(1)(c) (1986):

> 1. A person commits the crime of peace disturbance if:
>
> (1) He unreasonably and knowingly disturbs or alarms another person or persons by:
>
> • • •
>
> (c) Threatening to commit a crime against any person[.]

STATEMENT OF THE CASE

Respondent, Brian Carpenter, was charged by information on January 29, 1986, with three (3) counts of the Class B misdemeanor of peace disturbance, all in violation of Revised Statute of Missouri §574.010.1(1)(c). On June 18, 1986 Respondent filed a motion to dismiss, alleging §574.010.1(1)(c) to be unconstitutional on its face as being overbroad in regulating speech. In a judgment, opinion and order issued on July 14, 1986, the Circuit Court of Jefferson County, Missouri sustained Respondent's motion. From this order, the State of Missouri filed a timely appeal to the Supreme Court of Missouri. On September 15, 1987, that court affirmed the decision of the trial court. Following the court's denial of Petitioner's petition for rehearing, this petition for a writ of certiorari ensues.

Respondent was charged with three (3) counts of peace disturbance in violation of §574.010. These counts, in pertinent part, read:

COUNT I

> [T]he Defendant unreasonably and knowingly disturbed or caused alarm to Dawn Mead by threatening to commit the crime of murder against Dawn Mead.

COUNT II

> [T]he Defendant unreasonably and knowingly disturbed or caused alarm to Dawn Mead by threatening to commit the crime of arson against M. Shannon Craig and Dawn Mead.

COUNT III

[T]he Defendant unreasonably and knowingly disturbed or caused alarm to M. Shannon Craig by threatening to commit the crime of assault against Dawn Mead.

Section 574.010.1(1)(c), RSMo 1986, under which Respondent was charged, provides,

1. A person commits the crime of peace disturbance if:

(1) He unreasonably and knowingly disturbs or alarms another person or persons by:

• • •

(c) Threatening to commit a crime against any person[.]

In affirming the trial court's ruling sustaining Respondent's motion to dismiss, the Supreme Court of Missouri concluded that the statute in question was overly broad, stating "[t]he statute contemplates punishing a person for any and all utterances that if carried out would constitute criminal offenses under Missouri law". (App. A4-A5).

REASONS FOR GRANTING WRIT

The Supreme Court of Missouri's opinion adopts an unduly limited view of what may constitute unprotected speech by ignoring the express and implied limitations on the application of the peace disturbance statute, and by failing to find that any conceivable impermissible applications of the statute are dwarfed by the statute's legitimate reach in prohibiting threatened criminal activity.

In ruling that §574.010.1(1)(c) of the Missouri Peace Disturbance Statute was unconstitutionally overbroad, the Missouri Supreme Court opined that

> The statute contemplates punishing a person for any and all utterances that if carried out would constitute criminal offenses under Missouri law. No distinction is made as to the criminal activity that the provision encompasses. A person could be convicted regardless of how minor or insubstantial the purportedly threatened crime may be. Such prohibited offenses could include threatening to publicly display explicit sexual materials, §573.060, RSMo 1986, or even threatening to steal a book from a library, §570.210, RSMo 1986. The state's interest in prohibiting persons from threatening to commit offenses such as these does not outweigh the public interest in exercising free speech.

(App. A4-A5). Based on this reasoning, the court concluded that "[c]onsequently, the statute acts to smother speech otherwise protected by the First Amendment in that 'persons whose expression is constitutionally protected may well refrain from exercising their rights for fear of criminal sanctions provided by a statute suscep-

tible of application to protected expression.' *Gooding v. Wilson,* 405 U.S. 518, 521, 92 S.Ct. 1103, 1105, 31 L.Ed.2d 408 (1972)." (App. A5).

The court's opinion is patently wrong because it adopts an unduly limited view of what may constitute unprotected speech. No First Amendment protection is afforded words which "by their very utterance inflict injury." *Chaplinsky v. New Hampshire,* 315 U.S. 568, 572, 62 S.Ct. 766 (1942). The portion of the statute involved in this case is directed to this type of unprotected speech and may be limited by reasonable construction so as to punish socially undesirable conduct without infringing upon any constitutional protection.

This Court has held that if a statute may fairly be construed in a manner which limited its application to a "core" of constitutionally unprotected expression, it may be upheld against the charge that it is overly broad. *Cf. City of Houston v. Hill,* ..... U.S. ....., 107 S.Ct. 2502, 2508 (1987). In the instant case, the Missouri Supreme Court ignored the express and implied limitations on the application of §574.010.1(1)(c). The Court failed to recognize that there can be no violation of the law unless the offender *"unreasonably* and *knowingly* disturbs or alarms another person" by his threats. (Emphasis supplied). The statute also specifies that the threatened violation must constitute a crime against a *person.* Additionally, the Court could reasonably interpret the term "threaten" to require that the utterance be "so unequivocal, unconditional, immediate and specific as to the person threatened, as to convey a gravity of purpose and immediate prospect of execution." *United States v. Kelner;* 534 F.2d 1020, 1027 (2d Cir.), *cert. denied,* 429 U.S. 1022

(1976) (holding that a federal statute proscribing the transmission of threats in interstate commerce is not violative of the First Amendment). *See also, Watts v. United States,* 394 U.S. 705, 89 S.Ct. 1399, 22 L.Ed.2d 664 (1969).

At the crux of the Missouri Supreme Court's opinion though, is an unduly limited view of what may constitute unprotected speech. The protective cloak of the constitutional freedom of speech is limited in its scope; and the unconditional phrasing of the First Amendment is not intended to protect every utterance. *Roth v. United States,* 354 U.S. 476, 77 S.Ct. 1384, 1 L.Ed.2d 1498 (1957). Therefore, the right of free speech is not an absolute right. *Schenck v. United States,* 249 U.S. 47, 39 S.Ct. 247, 63 L.Ed. 470 (1919). In determining what is or is not protected speech, the interests asserted by state officials wishing to circumscribe certain speech must be weighed against the infringement of any protected rights of the individual. Respondent's conduct herein - threatening to commit murder, assault and arson, and in doing so unreasonably and knowingly disturbing and alarming those to whom his threats were made - can in no way, shape, or form be deemed to be expressions worthy of First Amendment protection.

Even assuming that the statute cannot be limited by the express and implied limitations on its application within the statute itself, any conceivable impermissible applications of the statute are dwarfed by its legitimate reach in prohibiting threatened criminal activity. This conclusion was reached by the Supreme Court of Illinois in its decision in *People v. Holder,* 96 Ill. 2d 444, 71 Ill. Dec. 677, 451 N.E.2d 831 (Ill. 1983).

In *Holder,* the Defendant was convicted of intimidation.[1] On appeal, he claimed that the statute under which he was convicted was unconstitutionally overbroad because it made it a criminal violation to engage in uninhibited discussion and effectively prohibited speech clearly protected by the First Amendment. The Supreme Court of Illinois, citing *Broadrick v. Oklahoma,* 413 U.S. 601, 93 S.Ct. 2908, 37 L.Ed.2d 830 (1973) and *New York v. Ferber,* 458 U.S. 747, 102 S.Ct. 3348, 73 L.Ed.2d 1113 (1982), concluded, in upholding the constitutionality of the questioned statute, that

> [W]hile it is true that under §12-6(a)(3) one could be prosecuted for threatening to picket in front of city hall without a permit . . ., or threatening to distribute literature that is deemed "offensive" within the right-of-way limits of a State toll highway . . ., we find that any such conceivable impermissible applications are dwarfed by the statute's legitimate reach in prohibiting threatened criminal activity.
>
> The *Broadrick* court said that a statute would be declared to be overbroad on its fact "only when the flaw is of substantial concern in the context of this statute as a whole." *Broadrick v. Oklahoma,* 413 U.S. 601, 616 n. 14, 93 S.Ct. 2908, 2918, n. 14, 37 L.Ed.2d 830, 842 n. 14 (1973).

---

1. Section 12-6(a)(3) of the Illinois Criminal Code of 1961 (Ill. Rev. Stat. Ch. 38, §12-6(a)(3) (1977), under which the Defendant was convicted, provides:

> "A person commits intimidation when, with intent to cause another to perform or to omit the performance of any act, he communicates to another a threat to perform without lawful authority any of the following acts:
>
> . . .
>
> (3) Commit any criminal offense[.]"

> We feel that the flaw in §12-6(a)(3) is not a "substantial concern" when viewed in the context of the legitimate sweep of an intimidation statute.

Id. at 835.

Petitioner concurs with this reasoning and is opposed to the subsequent reasoning of the United States District Court of Illinois. The District Court, in granting Defendant Holder's petition for habeas corpus, disagreed with the Illinois Supreme Court and found the statute overbroad. See, *U.S. ex rel. Holder v. Cir. Court of 17th Jud. Cir.*, 624 F.Supp. 68 (N.D.Ill. 1985). The District Court held that the statute suffered from the infirmity of proscribing threats of minor infractions, making it an offense to threaten to commit a crime no matter how minor or insubstantial. *Id.* at 71.

The instant case presents an important issue to this Court because many of the other states have "breach of peace" or "disorderly conduct" statutes which could be equally susceptible to the erroneous and unduly limited view of what constitutes unprotected speech adopted by the Missouri Supreme Court. States whose peace disturbance statutes are somewhat similar to Missouri's include: Alabama (Ala. Code §13A-11-7 (1975)), Arkansas (Ark. Stat. Ann. §41-2908 (1977)), Connecticut (Conn. Gen. Stat. Ann. (§53a-181 (1987)), Delaware (Del. Code Ann. Tit. 11, §1303 (1979)), Hawaii (Hawaii Rev. Stat. §711-110 (1985)), Indiana (Ind. Code §35-45-1-3 (1985)), Kansas (Kan. Stat. Ann. §21-4101 (1981)), Kentucky (Ky. Rev. Stat. §525.060 (1985)), Mississippi (Miss. Code Ann. §97-35-15 (1972)), Montana (Mont. Code Ann. §45-8-101 (1987)), New Hampshire (N.H. Rev. Stat. Ann. §64:2 (1970)), North Dakota (N.D. Cent. Code §12.1-31-01 (1985)), Pennsylvania (PA. Stat. Ann. Tit. 18 §5503 (1983)), Rhode Island (R.I. Gen. Laws §11-45-1 (1956)),

South Dakota (S.D. Codified Laws Ann. §22-13-1 (1979)), Utah (Utah Code Ann. §76-9-102 (1978)), Vermont (Vt. Stat. Ann. Tit. 13 §1026 (1974)). Petitioner asserts that no uncertainty exists as to what conduct is proscribed by its statute. Further particularity in the statute would be unrealistic. Petitioner feels the states need guidance in this area.

CONCLUSION

The Petitioner respectfully requests that this Petition for a writ of certiorari be granted and that the Supreme Court of Missouri's judgment be reversed. Alternatively, he requests that the petition be granted and that full briefing and argument be scheduled.

Respectfully submitted,

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APPENDIX

APPENDIX A

(SEAL)

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October 13, 1987

Mr. Timothy Anderson
Office of the Attorney General
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Jefferson City, Missouri 65102

Re: State of Missouri vs. Brian Carpenter,
No. 68423

Gentlemen:

This is to advise that the Court has this day entered the following order in the above-entitled cause:

"Appellant's motion for rehearing overruled."

Very truly yours,

/s/ Thomas F. Simon
Clerk

cc: Mr. Steven M. Davis

APPENDIX B

(Filed September 15, 1987)

(SEAL)

SUPREME COURT OF MISSOURI
en banc

STATE OF MISSOURI,	)	
Appellant,	)	
vs.	)	No. 68423
BRIAN CARPENTER,	)	
Respondent.	)	

Appeal From the Circuit Court of Jefferson County
Twenty-Third Judicial Circuit, Division XI
Honorable Gary P. Kramer, Judge

This is an appeal by the State of Missouri from an order of the Jefferson County Circuit Court invalidating section 574.010.1(1)(c), RSMo 1986, as being unconstitutionally overbroad in regulating speech. This Court has exclusive jurisdiction of the cause pursuant to Mo. Const. art. V, § 3, because it involves the validity of a statute of this state.

On January 29, 1986, respondent was charged with three counts of peace disturbance in violation of section 574.010. Those counts, in pertinent part, read:

Count I

> [T]he defendant unreasonably and knowingly disturbed or caused alarm to Dawn Mead by threatening to commit the crime of murder against Dawn Mead.

Count II

[T]he defendant unreasonably and knowingly disturbed or caused alarm to Dawn Mead by threatening to commit the crime of arson against M. Shannon Craig and Dawn Mead.

Count III

[T]he defendant unreasonably and knowingly disturbed or caused alarm to M. Shannon Craig by threatening to commit the crime of assault against Dawn Mead.

Respondent filed his motion to dismiss on June 18, 1986, alleging, as he does now, that section 574.010.1(1)(c) is overbroad on its face. The motion was sustained by the circuit court and this appeal arises from the dismissal. We affirm.

Section 574.010.1(1)(c), under which the respondent was charged, provides,

> 1. A person commits the crime of peace disturbance if:
>
> (1) He unreasonably and knowingly disturbs or alarms another person or persons by:
>
> * * *
>
> (c) Threatening to commit a crime against any persons; . . .

The threshold question is whether respondent has standing to challenge the constitutionality of the statute. As a general rule, a person to whom a statute may constitutionally be applied may not challenge that statute on the ground that it may conceivably be applied unconsti-

tutionally to others in situations not before the court. United States v. Raines, 362 U.S. 17, 21, 80 S.Ct. 519, 522, 4 L.Ed.2d 524 (1960). However, the traditional rule of standing is not without its exceptions. When a party is asserting his First Amendment rights, the party may attack an overly broad statute even though his conduct could have been regulated by a statute drawn with the requisite narrow specificity. Dombrowski v. Pfister, 380 U.S. 479, 486, 85 S.Ct. 1116, 1120, 14 L.Ed.2d 22 (1965).

The standard for First Amendment overbreadth analysis is well established. "Only a statute that is substantially overbroad may be invalidated on its face." City of Houston v. Hill, 55 U.S.L.W. 4823, 4825 (U.S. June 16, 1987), (citing New York v. Ferber, 458 U.S. 747, 102 S.Ct. 3348, 73 L.Ed.2d 1113 (1982), and Broadrick v. Oklahoma, 413 U.S. 601, 93 S.Ct. 2908, 37 L.Ed.2d 830 (1973)). Moreover, "criminal statutes must be scrutinized with particular care, . . .; those that make unlawful a substantial amount of constitutionally protected conduct may be held facially invalid even if they also have legitimate application." *Hill, supra,* 55 U.S.L.W. at 4826.

In its present form, the statute prohibits a person from "unreasonably and knowingly" disturbing or alarming other persons by "threatening to commit a crime." Obviously, the offense prohibited under the peace disturbance statute regulates only spoken words, the communication of a threat. It involves merely speech because the conduct threatened, "a crime," must necessarily be proscribed by another section of the Missouri statutes.

The statute contemplates punishing a person for any and all utterances that if carried out would constitute

criminal offenses under Missouri law. No distinction is made as to the degree of criminal activity that the provision encompasses. A person could be convicted regardless of how minor or insubstantial the purportedly threatened crime may be. Such prohibited offenses could include threatening to publicly display explicit sexual materials, section 573.060, RSMo 1986, or even threatening to steal a book from a library, section 570.210, RSMo 1986. The state's interest in prohibiting persons from threatening to commit offenses such as these does not outweigh the public interest in exercising free speech.

Moreover, there is no guarantee under the statute that a substantial likelihood exists that such threatened criminal conduct will ever occur. There may be many situations where the threatened activity will neither be imminent nor likely. Consequently, the statute acts to smother speech otherwise protected by the First Amendment in that "persons whose expression is constitutionally protected may well refrain from exercising their rights for fear of criminal sanctions provided by a statute susceptible of application to protected expression." Gooding v. Wilson, 405 U.S. 518, 521, 92 S.Ct. 1103, 1105, 31 L.Ed.2d 408 (1972).[1]

As stated in State v. Swoboda, 658 S.W.2d 24, 25 (Mo. banc 1983) (citing City of St. Louis v. Tinker, 542 S.W.2d 512 (Mo. banc 1976) and City of Kansas City v. Thorpe, 499 S.W.2d 454 (Mo. 1973)), "Missouri courts have held that statutes abridging speech are constitutional

---

1. Although, a limiting construction would avoid imposition of the facial overbreadth conclusion, *Broadrick v. Oklahoma, supra*, 413 U.S. at 613, there is no indication that such a construction would be consistent with the intent of the legislature. In fact, the plain language of the statute would indicate to the contrary. We thus refrain from any attempt to redraft the statute.

to the extent that they prohibit only that speech which is likely to incite others to immediate violence." Thus, the statute must also be construed to only prevent "fighting words." The Supreme Court has held that such offensive language can be statutorily prohibited only if it is personally abusive, addressed in a face-to-face manner to a specific individual and uttered under circumstances such that the words have a direct tendency to cause an immediate violent response by a reasonable recipient. *See,* Gard, Fighting Words as Free Speech, 58 Wash.U.L.Q. 531, 558-60, 580 (1980) (citing Chaplinsky v. New Hampshire, 315 U.S. 568, 62 S.Ct. 766, 86 L.Ed. 1031 (1942)).

In *Swoboda,* a portion of the Missouri peace disturbance statute prohibiting "loud and abusive" language, section 574.010.1(1)(b), RSMo 1978, was held to be overly broad because it sought "to punish more than face-to-face words." *State v. Swoboda, supra,* 658 S.W.2d at 26-27. Much of that reasoning is no less applicable in the present case. The statute attempts to go much further than mere "fighting words."

We, therefore, conclude that section 574.010.1(1)(c), RSMo 1986, is overbroad and that the circuit court did not err in holding it facially invalid.

The judgment of the trial court is affirmed.

.....

Robert T. Donnelly, Judge

Billings, C.J., Welliver and Higgins, JJ., concur; Blackmar, J., dissents in separate opinion filed; Robertson and Rendlen, JJ., dissent and concur in separate dissenting opinion of Blackmar, J.

(Filed September 15, 1987)

(S E A L)

SUPREME COURT OF MISSOURI
en banc

STATE OF MISSOURI, Appellant,	)	
vs.	)	No. 68423
BRIAN CARPENTER, Respondent.	)	

DISSENTING OPINION

This Court is not required to give a statute its broadest and most literal interpretation when applying First Amendment overbreadth analysis. If the statute may fairly be construed in a manner which limits its application to a "core" of constitutionally unprotected expression, it may be upheld against the charge that it is overly broad. *Cf. City of Houston v. Hill*, ... U.S. ....., ..., 55 U.S.L.W. 4823, 4828 (1987). The majority opinion ignores the express and implied limitations on the application of Section 574.010.1(1)(c), concluding that: "[t]he statute contemplates punishing a person for any and all utterances that if carried out would constitute criminal offenses under Missouri law."

The majority's reading of the statute fails to recognize that there can be no violation of the law unless the offender "*unreasonably* and *knowingly* disturbs or alarms another person" by his threats. (Emphasis supplied). The statute also specifies that the threatened violation must constitute a crime against a *person*. Additionally, we

could reasonably interpret the term "threaten" to require that the utterance be "so unequivocal, unconditional, immediate and specific as to the person threatened, as to convey a gravity of purpose and immediate prospect of execution." *United States v. Kelner*, 534 F.2d 1020, 1027 (2d Cir.), *cert. denied*, 429 U.S. 1022 (1976) (holding that a federal statute proscribing the transmission of threats in interstate commerce is not violative of the First Amendment). *See also Watts v. United States*, 394 U.S. 705 (1969).

A fair reading of Section 574.010.1(1)(c) would not, as the majority suggests, permit prosecution of an individual who threatens to steal a book from a library. First, such a statement could not conceivably be construed as an unreasonably disturbing or alarming pronouncement. Moreover, the theft of public property is not a crime which falls within any reasonable classification of crimes against persons.

At the crux of the majority opinion is an unduly limited view of what may constitute unprotected speech. No First Amendment protection is afforded words which "by their very utterance inflict injury." *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942). The statute is directed to this type of unprotected speech and, in my view, the limiting language discussed above should allow it to successfully withstand the charge that it is overly broad.

State v. Swoboda, 658 S.W.2d 24 (Mo. banc 1983) is clearly distinguishable. It construed a portion of an earlier version of the statute now before us and held that the phrase "loud and abusive language" was subject to a construction which would invade the area of pro-

tected speech. The portion of the statute involved in this case may be limited by reasonable construction so as to punish socially undesirable conduct without infringing upon any constitutional protection.

The Information is in the language of the statute. Count I charges a threat of murder; Count II of arson; and Count III of assault. Murder and assault are offenses under Chapter 565, RSMo, titled "Offenses Against the Person". Arson is not included in this chapter but the crime of arson is one which is potentially life threatening and would surely cause alarm to persons. The statute may be reasonably read as applying only to crimes such as these. The Information is sufficient on its face and the motion to dismiss should have been overruled.

.....

Charles B. Blackmar, Judge

APPENDIX C

IN THE
CIRCUIT COURT OF THE TWENTY-THIRD
JUDICIAL CIRCUIT OF MISSOURI
AT HILLSBORO, JEFFERSON COUNTY,
MISSOURI, DIV. NO. XI

STATE OF MISSOURI, Plaintiff,	)	
vs.	)	No. CR186-119-MX-AXI
BRIAN CARPENTER, Defendant.	)	

JUDGMENT, OPINION AND ORDER

The within captioned cause is a criminal prosecution wherein defendant is charged with three counts of Peace Disturbance in violation of R.S.Mo. Section 574.010. The allegations of the information allege a violation under Subsection (1) (c) of that section in essense [sic] that Defendant disturbed the peace by threatening to commit a crime.

Defendant argues that the statute R.S.Mo. Section 574.010 is unconstitutional on its face for overbreadth and has moved to dismiss the charges against him.

At the outset, it should be noted that the statute under which defendant is charged was enacted by the Missouri Legislature in 1984, after its predecessor was declared unconstitutional by the Missouri Supreme Court on October 18, 1983 in *State vs. Swoboda*, 658 S.W.2d 24 (1983) for overbreadth.

A review of *Swoboda,* together with the statute it declared unconstitutional, and the one replacing it are instructive.

The questions of procedure and standing, as well as the scope of the question presented by defendant are all clearly set out in *Swoboda* and precedents therein cited, so no extended discussion will be undertaken in this opinion.

It was clearly the legislature's intent to re-enact R.S.Mo. Section 574.010 in such a way as to avoid the constitutional infirmities outlined by *Swoboda* and they have no doubt done so in part. Subsection (1) (b) of the re-enacted statutes borrows language directly from *Swoboda* suggested therein as a method of meeting constitutional requirements. Subsection (1) (c), however, is not so limited explicitly, and it is this subsection which defendant is charged under, and where he directs his constitutional attack.

Swoboda quotes *Chaplinsky vs. New Hampshire* 315 U.S. 568, 62 S. Ct. 766, 86 L.Ed. 1031 (1942) and *Gooding v. Wilson* 405 U.S. 518, 92 S.Ct. 1103, 31 L.Ed.2d 408 (1972). The thrust of these cases as expostulated by our Missouri Supreme Court in *Swoboda* is that any speech is protected and may not be prohibited by statute, unless it is personally abusive, addressed in a face-to-face manner to a specific individual and uttered under circumstances such that the words have a direct tendency to cause an immediate violent response by a reasonable recipient. (This language was borrowed by the legislature for subsection (1)(b) to meet the objections of *Swoboda.* Subsection (1)(c) was, however, re-enacted

without change by the legislature, and apparently without thought as to how *Swoboda* might affect it.)

As currently in force R.S.Mo. 574.010 (1)(c) reads:

A person commits the crime of peace disturbance if:

(1) He unreasonably and knowingly disturbs or alarms another person or persons by:

. . .

(c) Threatening to commit a crime against any person;

Swoboda seems to require confrontation (i.e. face-to-face) and speech (some verbal communication), under circumstances likely to provoke an immediate and violent response (i.e. a breach of the peace).

Under subsection (1)(c) one might, to a co-worker, threaten to "blow the boss's head off" and thereby cause alarm to the co-worker. But it is unlikely that such a statement under such circumstances would be "likely to produce an immediate violent response" from the co-worker (who we shall assume is "a reasonable recipient").

The example just cited is constitutionally protected under the reasoning of *State vs. Swoboda,* 658 S.W.2d 24 (1983), though facially prohibited by 574.010 as re-enacted by laws of 1984 session of the Missouri Legislature. As such said section is unconstitutional as overbroad and hence the statute must fall.

The charges of Peace Disturbance in 3 counts against defendant herein are, perforce, dismissed and the defendant is discharged.

It is so Ordered this 14th day of July, 1986.

/s/ Gary P. Kramer
Gary P. Kramer
Judge, Div. XI
23rd Judicial Circuit

cc: Mark Cero, Assist Pros. Attorney
David Crosby, Assist. Public Defender
Hon. William Webster, Attorney General,
State of Missouri

APPENDIX D

IN THE
CIRCUIT COURT OF THE TWENTY-THIRD
JUDICIAL CIRCUIT OF MISSOURI
AT HILLSBORO, JEFFERSON COUNTY,
MISSOURI DIVISION NO. 11

STATE OF MISSOURI,	)	
Plaintiff,	)	
vs.	)	No. CR186-119-M-A11
BRIAN CARPENTER,	)	
Defendant.	)	

MOTION TO DISMISS

Comes now the Defendant through counsel David R. Crosby and moves this Court to dismiss the information in the above-styled cause because defendant is charged with violating Section 547.010 Revised Statutes of Missouri (Supp.1984). Said statute is unconstitutional because it is overly-broad in violation of the First and Fourteenth Amendments to the United States Constitution and Article I, Sections 8 and 18(a) of the Missouri Constitution. The Defendant submits the following suggestions in support of this Motion.

SUGGESTIONS

In 1983 the Missouri Supreme Court declared that Missouri's Peace Disturbance Statute, 574.010 RSMo. 1979, was unconstitutional on it's [sic] face because it is overbroad in regulating speech. *State v. Swoboda*, 658 S.W. 2d 24 (en. banc. 1983). The following year the Legislature re-

wrote 574.010 in an attempt to make the law conform to the constitution. The new statute has the same fatal defects as the old one (the statutes are attached in the appendix to this motion) and is therefore unconstitutional.

A statute is fatally overbroad if it in an effort to regulate unprotected conduct words, also regulates protected conduct. The peace disturbance statute regulates speech among other things. Loud noises, (other than speech) fighting and noxious and offensive odors do not qualify for First Amendment protection. However, offensive and indecent language and threats to commit a crime are speech and the speakers are entitled to protection unless they fall into the unprotected classification of "fighting words". The concept of fighting words is expounded in *Chaplinsky v. New Hampshire,* 315 U.S. 568, 62 S. Ct. 766, 86 L. Ed. 1031 (1942); fighting words are speech which by its very utterance tend to incite violence.

If a statute, such as 574.010 regulates speech it must do so narrowly. *Gooding v. Wilson,* 405 U.S. 518, 92 S. Ct. 1103, 31 L. Ed. 2d 408 (1972). The Statute can only stand if it prohibits only speech which is likely to incite others to immediate violence. *Swoboda* at 25, *City of St. Louis v. Tinker,* 542 S.W. 2d 512 (Mo. banc. 1976) *City of Kansas City v. Thorpe,* 499 S.W. 2d 454 (Mo. 1973).

Even those persons who are charged with conduct which is not protected cannot be punished when the statute is overbroad. Anyone charged with a crime may raise the issue of the statute's overbreadth if it involves freedom of speech. *Coates v. City of Cincinnati,* 402 U.S.

611, 91 S. Ct. 1686, 29 L. Ed. 2d 214. Clearly the defendant in this cause may challenge the constitutionality of the new statute.

In *Swoboda* the Court held that the old statute was unconstitutionally overbroad in that it prohibited protected speech as well as unprotected "fighting words". The Court found overbroadness in two aspects, first because the prohibition against "abusive language" includes vehement political discussion which is protected. (*Swoboda* at 25) and secondly because the statute punishes more than "face-to-face words" and in order to qualify as unprotected "fighting words" the speech must be face to face. (*Swoboda* at 26).

The new statute attempts to narrow the breadth of the law at least in respect to the first area but seemingly makes the statute more broad in the "face to face" aspect of overbreadth. In comparing the scope of the two statutes it is helpful to examine them in light of the comments of the old statute found in V.A.M.S. volume 41a and the appendix of this motion. The old statute was an attempt to balance the degree of governmental regulation in the home; it provided no prohibitions against disturbing the peace of individuals when both the perpetrator and victim are both rightfully on the same private premises. The old statute prohibited people rightfully (i.e. on their own land or as invitees) on private premises from disturbing the peace of those on another premises; and also prohibited people on public premises or private premises uninvited from disturbing the peace of other people regardless of the victim's location.

What the new statute does is to gut the distinction between private and public premises. The new statute is

more broad in that it now punishes peace disturbance between citizens in their own home. The problem with the first statute was that it regulated non "face to face speech" in that the victim could be on a different premises; the new statute does not make location an element and therefore does not alleviate the overbreadth problem. It is ironic that in essence the new statute regulates more speech than the old statute in the name of making the statute more narrow.

Under the facts in *Swoboda;* the defendant was charged with violation of old statute 571.010(1)(b) . . . "causing alarm to another person not physically on the same premises . . . by loud and abusive language"; the defendant was in his yard shouting obscenities and thereby caused alarm to a lady who lived across the street. When the *Swoboda* decision made the statute unconstitutional the legislature rewrote section (1)(b) to prohibit ". . . offensive and indecent language which is likely to produce an immediate violent response from an immediate recipient."

The issue presented by this case involves 574.010(1)(c) which was not narrowed by the new statute and arguably not declared unconstitutional by *Swoboda,* because that section was not before the Court. See 1.140 RSMo. 1979-Severability of statute provisions.

To declare Section (1)(c) unconstitutional it first must involve protected speech. "Threatening to commit a crime against any person" clearly could be "fighting words" but such words are not always fighting words. First of all "threatening to commit a crime against any person needs to be defined and the statute itself provides no guidance. One reading of that phrase would limit it

to threats of crimes found in Chapter 565 entitled "Offenses Against the Person"; another reading would include crimes other than those prohibited by Chapter 565 which involve harming another person, i.e. sexual offenses, Arson in the First Degree and Burglary in the First Degree under 569.160(2) but exclude Burglary in the Second Degree and Arson in the Second Degree as they are crimes against property and not crimes against any person. Under this reading, Count II of the information must be dismissed for failure to allege an essential element of the offense in that the "Arson" does not allege a threat against any person.

A third reading of the statute could find the statute encompassing all acts forbidden by Missouri Law. And indeed the MAI-CR 2d jury instruction lend credence to such a broad interpretation of 574.010(1)(c). The instruction 28.02 (found in the appendix) asks the Court to "state what crime and against whom, if anyone; affecting what property if any; and other facts necessary to show the threatened criminal action resulting in peace disturbance."

Such a broad definition would be overbroad in that a threat to commit a crime against property or the administration of justice are not fighting words. A threat by "X" to steal property of "Y" may alarm "Z" but is not likely yo [sic] incite "Z" to violence. While a threat to lie on a public defender application in violation of 600.086 (4) RSMo. (Supp. 1984) would surely alarm all those who thirst for justice, but this writer doubts whether that constitutes "fighting words".

In any event even the narrowest definition of the term "crime against any person" is fatally defective in

that the statute fails to include all of the elements of fighting words. There is no requirement that the threat be of immediate harm; to tell a person that "someday I'll kill you" would not be a civil tort of assault neither should it be a crime. In addition the statute does not require that the threat be likely to incite a violent response. Ralph Kramden's famous threat to hit his wife Alice "to the moon" never would incite the unflappable Mrs. Kramden to violence on "The Honeymooners," despite unreasonable desire to alarm his wife.

Threats can be protected speech. The words "If they ever make me carry a rifle the first man I want to get in my sights is L.B.J." was found by the U.S. Supreme Court to not to violate a statute which prohibited any person from knowingly and willfully making a threat . . . against the President of the United States. *Watts v. United States,* 394 U.S. 705, 89 S. Ct. 1399, 22 L. Ed. 2d 664 (1969). The Court found such language to be a "crude offensive method of stating political opposition to the president. It should also be noted that while the Court found the statute to be constitutional on its face and unconstitutional in its application the court seemingly applied a balancing test and decided that the governmental interest in protecting the Office of the President permitted some infringement on unprotected speech. The governmental interest in 574.010 in preserving the peace of an individual is not as important as the governmental interest in protecting our country's leader.

In addition the Court in *Watts* stresses that the statute forbades "willful" threats. The Court seems to hint that willful means that the defendant must intend to carry out his threat. At the very least willful threat means "an apparent determination to carry them into

execution." *Watts*, 394 U.S. 705, 707, 22 L. Ed. 2d 664, 667. The Missouri Statute contains no willfullness element.

The Missouri Statute 574.010(1)(c) is not carefully drawn as to only punish unprotected speech and is susceptible to be applied to protected speech. "Because the First Amendment Freedoms need breathing space to survive, government may regulate only with narrow specificity" *NAACP v. Button*, 371 U.S. 415, 83 S. Ct. 328, 9 L. Ed. 2d 405 (1963)

THEREFORE, this Court should declare that Section 574.010(1)(c) is unconstitutionally overbroad and the information in the above-styled cause dismissed.

Respectfully submitted

/s/ David R. Crosby myl
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A copy of the above was delivered to the Office of the Prosecuting Attorney for Jefferson County this 3rd day of July, 1986.

/s/ Mary J. Linderer
Mary J. Linderer
Office Manager